

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL PALMASON,

Plaintiff,

v.

WEYERHAEUSER COMPANY, *et al.*,

Defendants.

Case No. C11-0695RSL

ORDER DENYING MORGAN STANLEY'S  
MOTION TO DISMISS

This matter comes before the Court on “Defendant Morgan Stanley’s Motion to Dismiss Plaintiffs’ Second Amended Complaint” (Dkt. # 149) and the related “Request for Judicial Notice” (Dkt. # 151). Plaintiffs allege that Morgan Stanley manages a significant portion of the investments in the Weyerhaeuser Retirement Plan and breached its fiduciary duties to plaintiffs and other plan participants. In particular, plaintiffs allege that Morgan Stanley failed to adhere to the governing investment policy and guidelines with regards to the total exposure/risk of the trust’s portfolio, consistently miscalculated the level of risk inherent in the hedge fund and private equity investments it chose, added additional risk to the portfolio by using derivatives and/or leverage, and selected so many complicated alternative investments for the plan that it was impossible to perform adequate due diligence on each to determine their actual level of risk. Plaintiffs allege that Morgan Stanley is not only liable for these breaches of fiduciary duty under ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), but is also liable for the

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1 breaches of Weyerhaeuser and its investment committee of which it knew but failed to remedy  
 2 under ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3). Morgan Stanley moves to dismiss all of  
 3 plaintiffs' claims on the grounds that plaintiffs have failed to provide sufficient factual detail to  
 4 raise a plausible inference that Morgan Stanley mismanaged the plan assets, otherwise breached  
 5 its fiduciary duties, or had actual knowledge of the breaches of its co-defendants.

#### 6 **A. SCOPE OF REVIEW**

7 In support of its motion, Morgan Stanley offers a number of documents for the  
 8 Court's consideration. In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the  
 9 Court's review is generally limited to the contents of the complaint. Campanelli v. Bockrath,  
 10 100 F.3d 1476, 1479 (9th Cir. 1996). The Court may, however, consider documents referenced  
 11 extensively in the complaint, documents that form the basis of plaintiffs' claim, and matters of  
 12 judicial notice when determining whether the allegations of the complaint state a claim upon  
 13 which relief can be granted. United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).

14 Morgan Stanley has provided a copy of the Investment Management Agreement  
 15 through which Morgan Stanley managed the plan assets and certain exhibits thereto. The  
 16 agreement forms the basis of plaintiffs' claims, and plaintiffs have not challenged its  
 17 authenticity. See Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other  
 18 grounds, Galbraith v. County of Santa Clara, 307 F.3d 1119, 127 (9th Cir. 2002). For purposes  
 19 of this motion, the Court finds that the accuracy and authenticity of the agreement and attached  
 20 exhibits are not reasonably in dispute, and they will therefore be considered.

21 Pursuant to Fed. R. Ev. 201, the Court may take judicial notice of facts that are  
 22 "not subject to reasonable dispute because it: (1) is generally known within the trial court's  
 23 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose  
 24 accuracy cannot reasonably be questioned." The Court will take judicial notice of  
 25 Weyerhaeuser's 2010 Form 10-K, the February 2009 United States Department of Labor Private  
 26 Pension Bulletin Historical Tables and Graphs, and Weyerhaeuser's 2007 Form 5500. These

1 documents were filed with or produced by government agencies, plaintiffs have not challenged  
2 the authenticity of these documents, and their existence and contents can be ascertained by resort  
3 to public records. The factual statements and opinions contained therein have not been  
4 conclusively established, however, and plaintiffs may contest their accuracy in this litigation.

5         When determining whether plaintiffs have asserted a plausible claim for relief, the  
6 Court will not consider the various screen shots that purport to summarize and/or graph  
7 voluminous data gathered by private financial reporting services. While three of the screen shots  
8 are available on the internet from Yahoo! Finance, such publication does not make the screen  
9 shots public records as that phrase is normally understood and Morgan Stanley makes no attempt  
10 to show that Yahoo! Finance is a reliable internet source for the type of information provided.  
11 Nor does the Court have any means by which to confirm the accuracy of the underlying data or  
12 the manner in which it has been presented. As for the data produced by Bloomberg Professional  
13 Service, it is available by payment only and is not generally accessible or known.

#### 14 **B. PLEADING STANDARD**

15         Pursuant to Fed. R. Civ. P. 8(a)(2), a complaint must include “a short and plain  
16 statement of the claim showing that the pleader is entitled to relief.” Although a complaint  
17 challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations, it  
18 must offer “more than labels and conclusions” and contain more than a “formulaic recitation of  
19 the elements of a cause of action.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).  
20 When a complaint fails to adequately state a claim, such deficiency should be “exposed at the  
21 point of minimum expenditure of time and money by the parties and the court.” Id. at 558. A  
22 complaint may be lacking for one of two reasons: (i) absence of a cognizable legal theory or  
23 (ii) insufficient facts under a cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc.,  
24 749 F.2d 530, 534 (9th Cir. 1984).

25         In ruling on a motion to dismiss, the Court must assume the truth of the plaintiffs’  
26 allegations and draw all reasonable inferences in the plaintiffs’ favor. Usher v. City of Los

1 Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The allegations must give rise to something more  
2 than mere speculation that plaintiff has a right to relief. Twombly, 550 U.S. at 555. The  
3 question for the Court is whether the facts alleged in the complaint sufficiently state a  
4 “plausible” ground for relief. Twombly, 550 U.S. at 570.

5 **C. ADEQUACY OF THE PLEADING**

6 Having reviewed the memoranda, declarations, and exhibits submitted by the  
7 parties (except for Exhibits B, E, F, and G to the Request for Judicial Notice),<sup>1</sup> the Court finds as  
8 follows:

9 Plaintiffs have adequately identified the alleged breaches of fiduciary duty and set  
10 forth specific facts in support of each breach. Although the conclusions reached are clearly  
11 subject to debate, the factual allegations are not conclusory. Morgan Stanley’s preference for  
12 allegations tied exclusively to the assets it controls is understandable, but mathematical precision  
13 in the allocation of fault between and amongst all of the investment managers is not necessary  
14 given the nature of plaintiffs’ claims. Plaintiffs’ allegations of breach are based primarily on  
15 Morgan Stanley’s failure to appropriately calculate and adjust for risk in the portfolio it  
16 managed. The allegations regarding out-of-control risk are supported by additional allegations  
17 regarding the nature of the investments Morgan Stanley chose, the difficulty in properly valuing  
18 them and evaluating risk, the sheer number of such investments, the time period over which  
19 these investments were maintained, comparisons of historic records, and a disclosed method of  
20 calculating what the beta actually was during the relevant time frame. Morgan Stanley  
21 obviously disagrees with the methodology used and conclusions drawn, but for purposes of Rule  
22 8, it has adequate notice of plaintiffs’ breach of fiduciary duty claims and the facts upon which  
23 they are based.

24 Nor are the allegations supporting the co-fiduciary liability claim defective.


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26 <sup>1</sup> This matter can be decided on the papers submitted. Morgan Stanley’s request for oral  
argument is, therefore, DENIED.

1 Plaintiffs specifically allege actual knowledge. Taken with the remainder of the allegations of  
2 the Second Amended Complaint and the Investment Management Agreement, the allegations  
3 raise a plausible inference that Morgan Stanley knew that the investment committee had adopted  
4 guidelines emphasizing hedge fund and private equity investments and was aware of the  
5 exposure/risk incurred by its fellow investment manager so that it could attempt to control  
6 overall risk. The issue is not whether plaintiffs will be able to prove co-fiduciary liability or  
7 even whether they have alleged sufficient facts to give rise to a strong inference of knowledge  
8 (as would be required under the Private Securities Litigation Reform Act). Rather the issue is  
9 whether plaintiff has alleged sufficient facts that give rise to a plausible claim for relief. This  
10 they have done.

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12 For all of the foregoing reasons, Morgan Stanley's motion to dismiss (Dkt. # 149)  
13 is DENIED and the related request for judicial notice (Dkt. # 151) is GRANTED in part and  
14 DENIED in part.

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16 Dated this 26th day of April, 2013.

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18 Robert S. Lasnik  
19 United States District Judge  
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